IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

THE STATE OF TEXAS, et al., Plaintiffs, v. GOOGLE LLC, Defendant.	Civil Action No. 4:20-cv-00957-SDJ

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO STRIKE GOOGLE'S SECOND MOTION TO DISMISS

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Google's Opposition to Plaintiffs' Motion to Strike rests on misdirection. It is undisputed that jurisdiction is a threshold issue; that "[c]ourts and litigants should not waste time" on the merits of cases where jurisdiction is lacking; or that Google has every right to raise recent (albeit irrelevant) authority from the Fifth Circuit that it claims bears on this Court's adjudicatory authority. Opp. at 6. None of that changes a simple point that should be similarly undisputed: Google, like most every other litigant, could and should have raised its jurisdictional and merits arguments in the same motion, as Rule 12 requires. This Court has no doubt reviewed scores of motions that start by raising jurisdictional questions and then proceed to address the merits.

Following that ordinary course would have required Google to make strategic choices about how much space to dedicate to each argument without flouting this Court's page limits. Google preferred instead to grant itself a never-filed motion for more briefing space. Google pretends Plaintiffs' reading of Rule 12 would have required it "to *first* make a merits motion that the Court was obliged to then ignore," Opp. at 3, but all Rule 12 actually required was for Google to make all of its 12(b) defenses—subject matter jurisdiction and failure to state a claim—in a single filing. It is hardly a "hypertechnical misreading" of Rule 12 to adhere to its plain text. Opp. at 6. *Cf. Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning, and generally with them as with a statute, '[w]hen we find the terms ... unambiguous, judicial inquiry is complete.'" (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))).

The Rule plainly states: "Except *as provided* in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." (emphasis added). Google made a motion under "this rule" through its 12(b)(1) motion. Its 12(b)(6) arguments—filed hours later—

for failure to state a claim plainly were "available" to Google at that earlier time. That means Google should only be permitted to raise those arguments "as provided in Rule 12(h)(2)." That Rule permits failure to state a claim through a Rule 12(c) motion, a responsive pleading, or a motion at trial, all of which require Google to first answer the complaint. Google made a strategic choice to file separate 12(b) motions in hopes of obtaining extra pages for its litigation advantage. Plaintiffs seek the strategic benefit of Google's answer before addressing its textually premature motion. Rule 12 entitles them to this responsive pleading.

Fifth Circuit precedent does not require a different result. Affirming that a district court did not *abuse its discretion* in considering successive Rule 12(b)(6) motions, *Doe v. Columbia-Brazoria Indep. Sch. Dist. by & through Bd. of Trustees*, 855 F.3d 681, 687 (5th Cir. 2017), *Nationwide Bi-Wkly. Admin., Inc. v. Belo Corp.*, 512 F.3d 137 (5th Cir. 2007), is hardly an endorsement of Google's litigation tactics. Plaintiffs have no issue with Google reraising its motion to dismiss arguments at the appropriate time and would not deny that the Court has discretion to consider them (as it always has discretion to allow exceptions from page limitations and other rules). But Google should not be rewarded for defying the rules or effectively granting itself dispensations that should instead be requested.

CONCLUSION

Plaintiffs respectfully request that the Court strike Google's Motion to Dismiss filed at docket entry 202 as an improper second motion to dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 25, 2024, this document was filed electronically in compliance with Local Rule CV-5(a) and served on all counsel who have consented to electronic service, per Local Rule CV-5(a)(3)(A).

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